INDEX.

PAGE

STATEMENT OF THE CASE 1

ARGUMENT 4

Point One. Respondent, as lessee of restricted Indian land under lease for oil and gas development purposes, is an agent or instrumentality employed by the federal government for the development and use of such land to explore and produce oil and gas therefrom for the benefit of its Indian wards 4

Point Two. The states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control or affect, the operation of constitutional laws enacted by Congress for the purpose of carrying into execution the powers vested in the United States government, and cannot by taxation interfere with the instrumentalities of the federal government, nor the means employed by Congress to carry into effect the powers conferred by the Federal Constitution; and any such tax, no matter how reasonable, or how universal and undiscriminating, is repugnant to the Constitution of the United States 4-5

Point Three. Agencies and instrumentalities employed by the federal government and property used by them to explore and produce oil and gas from restricted Indian land for the benefit of its Indian wards are not subject to taxation by state authorities without congressional consent 5

Point Four. Agencies and instrumentalities employed by the federal government to develop Indian land and produce oil and gas therefrom for the benefit of its Indian wards are of such nature and so intimately connected with the necessary functions of government, that any taxation of them by the states would be such a direct interference with the functions of government itself, as to be plainly beyond the taxing power of the states 7

Point Five. An ad valorem tax by the State of Oklahoma upon equipment used to produce oil and gas by an instrumentality employed by the federal government to develop Indian land would retard, impede and burden the government in a greater degree and in a more direct manner than would a tax on the net income of the instrumentality 11

Point Six. If the State of Oklahoma has the power to levy an ad valorem tax on equipment used by a federal instrumentality to produce oil and gas from restricted Indian land it also has the power to enforce the tax by sale of the equipment, thereby depriving the instrumentality of the power to serve the government as it was intended to serve it and interfering with the government in the exercise of its governmental functions to secure the development of Indian land and an income therefrom for its Indian wards 12

CONCLUSION 14

AUTHORITIES CITED.

	PAGE
California v. Central P. R. Company, 127 U. S. 292	5
Choctaw O. & G. R. Company v. Harrison, 235 U. S. 292	4, 7, 9
Gillespie v. Oklahoma, 257 U. S. 500	4, 5, 7, 8, 9, 10, 11, 12
Howard v. Gypsy Oil Company, 247 U. S. 503	7, 9, 10
Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522	5, 7, 9
Jaybird Mining Company v. Weir, 271 U. S. 609	4, 5, 7, 10
Johnson v. Maryland, 254 U. S. 51	5
Large Oil Company v. Howard, 248 U. S. 549	7, 9, 10
M'Culloch v. Maryland, 4 Wheat. 316	5
Metcalf v. Mitchell, 269 U. S. 514	7, 8
Northern Pacific Railroad Company v. Rockne, 115 U. S. 600	12, 14
Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575	5, 6
U. S. Glue Company v. Oak Creek, 247 U. S. 321	11
Oklahoma Statutes 1931, Sec. 12581	2
Oklahoma Statutes 1931, Sec. 12727	12, 13

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1936.

No. 280

GEORGE W. TABER, TREASURER OF PAYNE COUNTY, OKLAHOMA, *Petitioner,*

vs.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, A CORPORATION, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

Statement of the Case.

Petitioner's brief in support of the petition for writ of *certiorari* does not contain a statement of the case and certain important and material facts involved in the case are not included in the petition for writ of *certiorari.*

Respondent became the owner by assignment of a departmental oil and gas mining lease, duly approved by the Secretary of Interior, covering certain restricted Pawnee Indian land situated in Payne County, Oklahoma. (R. 30-41) Under the terms of the lease respondent was required

to pay to the United States officer having jurisdiction over the leased premises for the benefit of the Indian lessors, as royalty, the sum of 12½ per cent of the gross proceeds of all crude oil extracted from the land, and also to furnish the Indian lessors free gas for domestic purposes, provided there be surplus gas produced from the premises. (Section 2, lease, R. 31-32.)

Respondent was also required under the terms of the lease to grant a lien on all improvements, tools, machinery, and all other personal chattels used in operating the leasehold as security for the payment of the royalty. (Section 6, lease, R. 35.)

The lease further provided that any buildings or permanent improvements erected on the leasehold by lessee should become the property of the owner of the land as a part of the consideration for the lease. (Section 5, lease, R. 34.)

The leasehold was developed for oil and gas and a number of producing wells were drilled thereon. (R. 24) Certain oil field equipment, consisting of derricks, casing, tanks, and other equipment, was placed on the leasehold by the respondent for use in connection with the producing wells located thereon. (R. 12) It was necessary to use all of this equipment in order to produce oil and gas from the leasehold, and the equipment was actually being used for that purpose on January 1, 1933, being the time when the taxable status of property for ad valorem purposes was fixed and determined for said year as provided by section 12581, Oklahoma Statutes 1931. (R. 44-45)

An ad valorem tax was levied on said equipment and respondent instituted this action in the District Court of

Payne County, Oklahoma, asserting that the equipment was exempt from taxation by the State of Oklahoma for the reason respondent was operating the leasehold as a federal instrumentality and was actually using the equipment for that purpose. (R. 7) On April 26, 1934, the District Court of Payne County, Oklahoma, adjudged and decreed that respondent was operating said leasehold on January 1, 1933, as a federal instrumentality, and as the equipment was being actually used in and around producing wells located thereon and was necessary to be used to produce oil and gas therefrom, that taxation thereof would constitute a tax upon and interference with the operations of a federal instrumentality in the performance of its governmental functions. (R. 90-94)

The cause was appealed to the Supreme Court of Oklahoma, and on March 12, 1935, said court affirmed the judgment of the District Court of Payne County, Oklahoma, deciding that respondent, as lessee of restricted Indian land under a lease for oil and gas development purposes, was an agent or instrumentality employed by the federal government for the development and use of such land to explore and produce oil therefrom for the benefit of its Indian wards, and the equipment used by respondent in so doing was so essentially connected with such agency or instrumentality as to be a part thereof, and such agency or instrumentality cannot be taxed by state authority without congressional consent. (R. 97-103)

ARGUMENT.

Petitioner contends that the decision of the Supreme Court of Oklahoma is in conflict with applicable decisions of this court and violates the rights, privileges and immunities of petitioner under the Constitution and statutes of the United States in that it fails to distinguish between a tax upon the personal property of a federal agent or instrumentality used in the operation of the agency and a direct tax upon the instrumentality itself.

We submit that the opinion of the Supreme Court of Oklahoma is fundamentally sound and correct and that the contention of petitioner is without merit, and his petition for writ of *certiorari* should be denied for the following reasons:

POINT ONE.

Respondent, as lessee of restricted Indian land under lease for oil and gas development purposes, is an agent or instrumentality employed by the federal government for the development and use of such land to explore and produce oil and gas therefrom for the benefit of its Indian wards.

—*Jaybird Mining Company* v. *Weir*, 271 U. S. 609;
Gillespie v. *Oklahoma*, 257 U. S. 500;
Choctaw O. & G. R. Company v. *Harrison*, 235 U. S. 292.

POINT TWO.

The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control or affect, the operation of constitutional laws enacted by Congress for the purpose of carrying into execution the powers vest-

ed in the United States government, and cannot by taxation interfere with the instrumentalities of the federal government, nor the means employed by Congress to carry into effect the powers conferred by the Federal Constitution; and any such tax, no matter how reasonable, or how universal and undiscriminating, is repugnant to the Constitution of the United States.

—*M'Culloch* v. *Maryland,* 4 Wheat. 316;
California v. *Central P. R. Company,* 127 U. S. 292;
Johnson v. *Maryland,* 254 U. S. 51;
Indian Territory Illuminating Oil Company v. *Oklahoma,* 240 U. S. 522;
Gillespie v. *Oklahoma,* 257 U. S. 501;
Jaybird Mining Company v. *Weir,* 271 U. S. 609.

In *Johnson* v. *Maryland,* 254 U. S. 51, this court said:

"With regard to taxation, no matter how reasonable, or how universal or undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch* v. *Maryland,* 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today."

Point Three.

Agencies and instrumentalities employed by the federal government and property used by them to explore and produce oil and gas from restricted Indian land for the benefit of its Indian wards are not subject to taxation by state authorities without congressional consent.

—*Shaw* v. *Gibson-Zahniser Oil Corporation,* 276 U. S. 575;
Jaybird Mining Company v. *Weir,* 271 U. S. 609.

In *Shaw* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 575, this court said:

> "What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them. *Metcalf* v. *Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 Sup. Ct. Rep. 172. The end sought and the mode of attaining it adopted by Congress in the legislation providing for the welfare of the Indians by setting apart, by allotment or otherwise, tribal lands or the public domain, restricted for their benefit, led to the conclusion that those lands and the uses of them were so intimately connected with the performance of governmental functions as clearly to require independence of all state control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation."

It is apparent from the above decisions that this court has heretofore determined that the purpose and character of legislation creating governmental agencies to explore and produce oil and gas from restricted Indian land for the benefit of the Indian wards of the government is such that in the absence of permissive Acts of Congress neither the leases, nor the exploitation of the land by the lessee, nor the agent's income from the lease, nor the products produced from the land, may be taxed by state authority. We submit that such agencies and the property used by them to produce oil and gas from Indian land are not subject to state taxation in any form in the absence of an express declaration by Congress. Congress has never subjected equipment used by a governmental agency in producing oil and gas from restricted Pawnee Indian land to state taxation, and, therefore, the State of Oklahoma is without

authority to levy an ad valorem tax on the equipment used by respondent to produce oil and gas from its restricted Pawnee Indian leasehold.

POINT FOUR.

Agencies and instrumentalities employed by the federal government to develop Indian land and produce oil and gas therefrom for the benefit of its Indian wards are of such nature and so intimately connected with the necessary functions of government, that any taxation of them by the states would be such a direct interference with the functions of government itself, as to be plainly beyond the taxing power of the states.

—*Metcalf* v. *Mitchell*, 269 U. S. 514;
Gillespie v. *Oklahoma*, 257 U. S. 501;
Choctaw O. & G. R. Company v. *Harrison*, 235 U. S. 292;
Jaybird Mining Company v. *Weir*, 271 U. S. 609;
Indian Territory Illuminating Oil Company v. *Oklahoma*, 240 U. S. 522;
Large Oil Company v. *Howard*, 248 U. S. 549;
Howard v. *Gypsy Oil Company*, 247 U. S. 503.

This court in the case of *Metcalf* v. *Mitchell*, 269 U. S. 514, after announcing the rule that while in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the agencies and the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by

the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power, said:

> "It is on this principle that, as we have seen, any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function *(Gillespie* v. *Oklahoma, supra)* is prohibited."

The case of *Gillespie* v. *Oklahoma*, 257 U. S. 501, referred to in *Metcalf* v. *Mitchell, supra,* cannot be distinguished in principle from the case at bar. The questions of law and the essential facts involved in that case and in this case are identical.

Both cases involve *(a)* oil and gas mining leases covering restricted Indian land, duly approved by the Secretary of the Interior under rules and regulations prescribed by him under authority of an Act of Congress; *(b)* leases granted by the government for the purpose of securing the development of restricted Indian land and a percentage of the oil (or its value) produced therefrom for the benefit of the Indian wards of the government; *(c)* leases operated under the supervision of the Interior Department and requiring the Indians' royalty to be accounted for to the Secretary of the Interior, or his agent (see lease, sections 2, 4 and 6, R. 30), and *(d)* agencies or instrumentalities created and controlled by the federal government, exclusively to enable it to perform a governmental function in fulfilling its duty to its Indian wards.

The nature of the agencies, their mode of constitution, and the purpose of the government in creating them, are identical in both cases. The agency in the case at bar is of

the same character and as intimately connected with the exercise of a power and the performance of a duty by the federal government as in the *Gillespie* case, *supra*, and, therefore, any taxation of it by the State of Oklahoma would result in direct interference with the functions of government itself, and is prohibited.

The only difference in the cases is that the *Gillespie* case involved a tax assessed under the Oklahoma Income Tax Law upon the net income derived by a lessee of restricted Creek and Osage Indian land from sales of his share of oil and gas received under his lease, while this case involves an ad valorem tax assessed under the Oklahoma law upon equipment actually and necessarily used by respondent to produce oil and gas from restricted Pawnee Indian land.

This difference does not afford ground for distinguishing the cases in principle. In a number of cases involving identical or similar governmental agencies the State of Oklahoma heretofore attempted to tax *(a)* leases covering restricted Indian land *(Indian Territory Illuminating Oil Company* v. *Oklahoma,* 240 U. S. 522); *(b)* the gross receipts from the total production of coal produced from Indian land *(Choctaw O. & G. R. Company* v. *Harrison,* 235 U. S. 292); *(c)* the gross value of the production of oil and gas less the Indians' royalty interest under leases made for the benefit of the Indians *(Large Oil Company* v. *Howard,* 248 U. S. 549; *Howard* v. *Gypsy Oil Company,* 247 U. S. 503); *(d)* the net income derived by lessee from the sale of his share of oil and gas produced from leases covering restricted Indian land *(Gillespie* v. *Oklahoma,* 257 U. S. 501); and *(e)* on an ad valorem basis ore in the possession

of a lessee produced from restricted Indian land under a departmental lease (*Jaybird Mining Company* v. *Weir*, 271 U. S. 609).

In each of the above mentioned cases the tax was condemned as an attempt to tax an instrumentality used by the United States in fulfilling its duty to the Indians. These cases when construed in connection with *Metcalf* v. *Mitchell, supra,* clearly show that the exemption from state taxation of a federal instrumentality employed by the government to develop Indian land for the benefit of its Indian wards, does not depend upon the character or kind of the property of the instrumentality sought to be taxed, which is the only difference between the *Gillespie* case and the case at bar.

The taxes prohibited in the cases of *Gillespie* v. *Oklahoma, Large Oil Company* v. *Howard,* and *Howard* v. *Gypsy Oil Company, supra,* involved only the net income of the lessees and their share of the oil and gas produced. (See *Jaybird Mining Company* v. *Weir,* 271 U. S. 609.) The Indian wards of the government had no interest in the property sought to be taxed in those cases, while in the case at bar the equipment is being used not only to produce profit for the instrumentality, but also to produce an income for the Indian wards. If the net income of the lessee and its share of the oil and gas produced are not taxable because the lessee is a federal instrumentality employed by the government for the development and use of restricted Indian land for the benefit of its Indian wards, certainly the equipment used by the lessee in so doing is so essentially connected with such agency or instrumentality as to be a part thereof and cannot be taxed by state authority without congressional consent.

Point Five.

An ad valorem tax by the State of Oklahoma upon equipment used to produce oil and gas by an instrumentality employed by the federal government to develop Indian land would retard, impede and burden the government in a greater degree and in a more direct manner than would a tax on the net income of the instrumentality.

—*Gillespie* v. *Oklahoma*, 257 U. S. 501;
U. S. Glue Company v. *Oak Creek*, 247 U. S. 321.

It is manifest that an ad valorem tax upon the equipment used by a federal instrumentality employed by the government to produce oil and gas from Indian land may be more burdensome than a tax on the net income received by the instrumentality from the sales of oil and gas produced from the land.

A tax upon the net income does not arise at all unless a profit is shown over and above all proper development costs, depletion allowances, depreciation, expenses and losses, and the tax cannot be heavy unless the profits are large. It is an indirect charge upon the business affected and has been allowed by this court in cases arising from the conduct of interstate commerce on the theory that at the most it is only a remote burden on such commerce. *(U. S. Glue Company* v. *Oak Creek, supra.)*

The burden of an ad valorem tax is more substantial and direct than a tax on the net income. It is laid irrespective of whether the equipment is being used to produce a profit or otherwise, and may be extended to such limits that oil and gas could only be produced at an actual loss, thus forcing the instrumentality to abandon the wells to the detriment of the Indian wards of the government.

It is obvious that an ad valorem tax imposed upon the equipment employed by the instrumentality must be paid from the net income of the instrumentality, and diminishes its net income as would a tax imposed upon the net income itself. Thus, such a tax would result indirectly in imposing a tax upon the net income of the instrumentality, which was prohibited by this court in *Gillespie* v. *Oklahoma, supra.*

We submit that it is clear that the effect of an ad valorem tax on the equipment is more direct than a tax on the net income condemned in the *Gillespie* case.

POINT SIX.

If the State of Oklahoma has the power to levy an ad valorem tax on equipment used by a federal instrumentality to produce oil and gas from restricted Indian land it also has the power to enforce the tax by sale of the equipment, thereby depriving the instrumentality of the power to serve the government as it was intended to serve it and interfering with the government in the exercise of its governmental functions to secure the development of Indian land and an income therefrom for its Indian wards.

—Section 12727, Oklahoma Statutes 1931;
Northern Pacific Railroad Company v. *Rockne,* 115 U. S. 600.

The equipment is used for the benefit of the Indian wards of the government as well as for the benefit of the lessee. The usual forms of departmental leases in general use covering restricted Indian land provide for the payment of a royalty and furnishing of free gas for domestic purposes to the Indian lessors, and for a lien upon the equipment used by the lessee as security for the payment of the royalty. (See lease, R. 30-41.)

If the State of Oklahoma has the power to levy an ad valorem tax on the equipment it also has the power to sell the equipment in case the tax is not paid. Section 12727, Oklahoma Statutes 1931, provides in part as follows:

> "* * * and within thirty days after such taxes on personal property shall become delinquent under the provisions of this article, the county treasurer shall issue warrants under his hand, directed to the sheriff, commanding such sheriff to levy the amount of such unpaid taxes, and the interest thereon, and the cost of advertising together with his lawful fees for collecting the same on chattels belonging to the person to whom such taxes were assessed, and on collecting the same to pay the amount collected into the county treasury, and to make returns of such warrants within sixty days thereafter. The sheriff on receipt of such a warrant, shall levy the same upon the property of the taxpayer and sell the same in manner and form as provided for the sale of personal property on execution, and shall be entitled to the same fees therefor as are provided by law for like sales on execution. * * *"

It is obvious that the right to operate the restricted Indian leasehold could not, by virtue of the state's taxing powers, be taken from the instrumentality and conferred upon the purchaser of the equipment at the tax sale. If the equipment was levied upon and sold for unpaid ad valorem taxes the purchaser thereof would have no right or authority to leave the equipment on the restricted Indian land, or to use it to operate the wells, and would be required to pull the casing from the wells, dismantle the derricks, and remove the equipment from the leasehold.

It is evident, therefore, that a sale of the equipment for taxes by the State of Oklahoma would result in totally destroying the producing wells, thereby defeating the pur-

pose of the government to provide a royalty income and gas for the benefit of its Indian wards, and depriving the lessee of the power to serve the government as it was intended to serve it. This would result in such direct interference with the functions of government as to be plainly beyond the power of the state.

The State of Oklahoma certainly could not sell the equipment and confer title thereto by tax sale free from the lien impressed thereon under the departmental lease. It follows, therefore, that the state is without power to tax the equipment, as a valid sale for taxes, being the highest exercise of sovereign power of the state, must carry title to the property sold paramount to all others, and if the sale does not confer such a title, it is because there exists no authority to make it. *(Northern Pacific Railroad Company* v. *Rockne*, 115 U. S. 600.)

Conclusion.

We, therefore, respectfully submit that the contention of petitioner is without merit and his petition for writ of *certiorari* should be denied.

Respectfully submitted,

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